In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of THE HALE COMPANY, a corporation, against INTERNATIONAL TRADING COMPANY OF AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE, a National Banking Corporation, Garnishee Defendant, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE EDWARD E. CUSHMAN, JUDGE

Petition for Rehearing

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The court has decided that plaintiff in error is not entitled to recover for two reasons:

First,—"Because the defendant in error could not accept the draft in part and dishonor it in part."

Second,—"If the defendant in error should have refused to accept or pay the draft on account of the John Sexton & Co. purchase, it should for the like reason, have refused to accept or pay the draft on account of the Montgomery Ward & Co. purchase, because, as already stated, the sugar did not satisfy or comply with the requirements of either contract as to quality; and had the defendant in error stood upon the strict letter of its contract it would have refused to accept or pay the draft in its entirety, and in that event there would have been no sales and no profits."

In the second reason, the court assumes the fact to be that payment on the Montgomery Ward & Co. letter of credit could have been refused for the same reason that payment on the Sexton & Co. letter was refused. In other words, that the sugar shipped by Kelley & Co. did not satisfy the requirements of either the Montgomery Ward & Co. letter of credit or the John Sexton & Co. letter of credit.

In this the court is in error. The Montgomery Ward & Co. letter of credit did not require any certificate as to quality or weight to accompany the

draft (see record, p. 32), while the John Sexton & Co. letter of credit expressly required such certificates. (See record, p. 53.) Hence, while the bank issuing the Sexton & Co. letter of credit was justified in refusing payment because of the fact that the description of the sugar in the Hongkong government certificate did not conform to the description in its letter of credit, the bank which issued the Montgomery Ward & Co. letter of credit was not justified in doing so.

If the sugar delivered to Montgomery Ward & Co. had not come up to the requirements of its *contract* with the International Trading Company, the only recourse Montgomery Ward & Co. would have had would be a suit for breach of contract against the International Trading Company. The bank issuing their letter of credit could not refuse to honor a draft drawn under it accompanied by a bill of lading and abstract of invoice, and hence it did not refuse payment, but promptly honored the draft.

We admit that "the defendant in error could not accept the draft in part, and dishonor it in part," and that "had the defendant in error stood upon the strict letter of its contract, it would have refused to accept or pay the draft in its entirety, and

in that event there would have been no sales and no profits." The defendant in error had a perfect right to refuse the draft as presented, and *had it done so, and notified Waterhouse & Co. or the International Trading Company, and returned or offered to return the letter of credit which had been assigned to it*, it would have been absolved from all responsibility.

If it had done so, that is, if it had done all of the three things above mentioned, Waterhouse & Co. and the International or the Interational alone, could have pursued either one of the following three courses:

First—They could have cabled Kelley & Co. their refusal to take so much of the sugar as was destined for Sexton & Co. and offered to take the balance and have the draft honored to the extent of the cost of such balance. Such offer would undoubtedly have been accepted, and the International and Waterhouse & Co. would have been sure of the profits on the Montgomery Ward & Co. deal.

Second—They could have obtained a correction of the certificate and held the sugar in Seattle until the arrival of the corrected certificate. There was still plenty of time for this as the draft was presented on June 23d, and the Ward & Co. letter did

not expire until Aug. 1st, and the Sexton & Co. letter not until August 20th. (See record, pp. 32 and 52.) If this had been done, profits might have been realized on both transactions.

Third—They could have refused to take any of the sugar and could have bought it elsewhere to fill both of the contracts. There was plenty of time to do this as is above indicated. If that course had been pursued, profits on both transactions might have been realized.

The bank did not choose to follow the course which would have freed it from all responsibility, and given Waterhouse & Co. and the International an opportunity to protect their interests, but it accepted the draft, said nothing to Waterhouse or the International, and retained the letters of credit. By adopting this course, it adopted all risks incident to it. It could have thrown all the risk upon the other parties, but it chose not to do so. By failing to avail itself of its undoubted right to refuse the draft, and by depriving the other parties of any of the alternatives above mentioned, the bank lost its right to throw all the responsibility upon the other parties, or any part of such responsibility. The bank took the risk and all the risk. It should therefore be obliged to abide by the result of it,

and not be allowed to shoulder the loss, or any part of it, upon any one else.

If, *after* the draft had been accepted, the bank had notified Waterhouse & Co. or the International of what had been done and the actual situation resulting therefrom, these parties together, or the International alone, could have adopted one of two courses:

First—They could have refused to take any part of the sugar and required the bank to return the letters of credit which had been assigned to it. The sugar necessary to fill both orders could then have been procured elsewhere, and they might have realized profits on both transactions. If this course had been adopted, the bank would have had the entire shipment on its hands instead of only the smallest part of it, and its losses would have been six or seven times larger.

Second—They could have agreed to accept so much of the sugar as was required to fill the Montgomery Ward & Co. order, leaving the balance in the bank's hands. By adopting this course they could have saved themselves the profits on the Montgomery Ward & Co. deal, and also save the bank from the tremendous loss which it would have

incurred if the first alternative course had been adopted.

The bank, however, gave the International and Waterhouse & Co. no opportunity to choose between these two courses of action, and now after the transaction is closed, when the only alternative left for the International and Waterhouse & Co. is to take the profits on the Montgomery Ward & Co. deal, the bank now claims, in effect, that the transaction should be treated as if the International and Waterhouse & Co. had not only repudiated the whole transaction, but had also relinquished their rights to the letters of credit to the bank, and the court, by its decision, has sustained them in that contention.

We submit that such a result is not justifiable.

But the court says:

"In view of the situation here disclosed, the trading company could not ratify what was done in part, and disaffirm in part; it could not claim the benefits under one contract and repudiate the burdens under the other."

We submit that this holding is erroneous for three reasons:

First—Assuming that the relationship between Waterhouse & Co. and the bank was that of prin-

cipal and agent, such holding is wrong because the acceptance of part of an agent's acts in which he follows directions is no ratification of other separable parts in which he was disobedient to his principal's orders, or negligent in the performance of his duties. See Corpus Juris, Vol. 2, 484, citing *Coursier v. Ritter*, 6 Fed. Cas. No. 3282; *Knowlton v. Logansport School City*, 75 Ind. 103; *Bank of Owensboro v. Western Bank*, 26 Am. Rep. 211.

Even though the bank had improvidently combined the two transactions into one, the separation of the part of the sugar necessary to fill the Montgomery Ward & Co. order was perfectly feasible and was actually accomplished, and consented to by the bank, and the bank is in no position to complain because, by accepting that part of the sugar, the loss of the bank was cut down to a small part of what it would have been if the sugar to fill the Montgomery Ward & Co. contract had not been accepted and the letters of credit had been given up.

Second—The court's holding is wrong, because the legal relationship existing between Waterhouse & Co. and the bank was not that of principal and agent, and therefore the question of ratification does not come into play here.

We have shown at length in our opening brief (pp. 33 to 36) that the legal relationship between the International and Waterhouse & Co. was not that of principal and agent, but that of employer and independent contractor. Our contentions upon that point were not combatted by our opponent, and the court has not expressly held us wrong in that contention. We now contend that the reasoning and the authorities applicable to the relationship between the International and Waterhouse & Co. are also applicable to the relationship existing between Waterhouse & Co. and the bank. We claim the relationship was not that of principal and agent, but that of employer and independent contractor. To the authorities cited in our opening brief, we will add the following from Anson on Contracts, p. 408 (Huffcutts ed.):

"'Agency' is not co-extensive with 'employment' though it is, unfortunately, not uncommon to speak of a person employed for any purpose as the agent of the employer. By agency I mean employment *for the purpose of bringing the employer into legal relations with a third party.*"

The bank was carrying on an independent business, in the course of which it undertook to issue a letter of credit in a transaction in which the Inter-

national Trading Company and Kelley & Company were interested, and later in another and different one between the same parties.

The bank was left at liberty to choose its own means and methods, and was responsible only to its employer for results which it undertook to bring about. It was not under the control of Waterhouse & Co. in any particular whatever. It was not to establish any legal relationship between Waterhouse & Co. or the International and Kelley & Co. or any third party. It was not to act in a representative capacity, but for itself alone. By issuing the letters of credit it was to bind itself to Kelley & Co., but not to bind Waterhouse & Co., or the International to Kelley & Co. The cablegrams which the bank sent to Kelley & Co., or rather to the International Banking Corporation of Hongkong, China, constituted complete and independent contracts between itself and Kelley & Co., when the latter acted upon them. See the following cases, hereinafter cited more at length:

American Steel Co. v. Irving National Bank, 226 Fed. 41.

Frey & Son v. Sherburne Co., 184 N. Y. S. 661.

Lafargue v. Harrison, 70 Cal. 380.

Such being the facts, the relation of principal and agent did not exist, and therefore the rule that a principal cannot take the benefit of a contract of his agent without taking its burdens has no place in this discussion.

In *Ellison v. Jackson Water Power Co.*, 12 Cal. 542, 552, Field J., says:

"These terms ('adoption' and 'ratification') are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however, unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent."

"The ratification of a contract necessarily implies the relation of principal and agent; and unless that relation existed, the idea of ratification is necessarily excluded."

Pittsburgh v. Gazzam, 32 Pa. St. 340, 347.

Third—In holding that the International and Waterhouse & Co. could not ratify in part and disaffirm in part, the court was evidently proceeding upon the theory that in accepting the draft in question, the bank was by that action also accepting performance of the contract between the International and Kelley & Co., and that it was accepting

the sugar itself; that it was up to Waterhouse & Co. and the International to either accept the bank's action as a whole or to reject it as a whole; that it could not accept part of such action and reject the other.

We submit that the bank's action in accepting the draft had no effect whatever as far as the matter of accepting performance of the contract between the International and Kelley & Co. was concerned. In this case, as in the case of every other letter of credit, there were two separate and independent contracts, one between the International and Kelley & Co. and the other between the bank and Kelley & Co. In the contract between the bank and Kelley & Co., the bank was only concerned with the question whether or not the draft and the documents accompanying it complied with the terms of the letter of credit or rather with the cablegrams. If they did, it was justified in honoring the draft. If they did not, it was not justified. If the draft and documents were correct, it mattered not whether the statements contained in them were true or false, or whether the documents were forged or spurious. (See *Woods v. Thiedeman*, 1 Hurlstone & Coltman, 478; *Ulster Bank v. Synnot*, 5 Irish C. Q. R. 595; *Guaranty Trust Co. of N. Y. v. Hannay & Co.*,

(1918), 87 L. J. (K. B.) 1223; *Bass v. Bank of Australasia* (1904), 90 L. T. 618.)

Neither did it matter to the bank whether Kelley & Co. had violated its contract with the International or not. That was none of its business. Even if the sugar had been brown sugar instead of white, and even if the bank had been fully aware of that fact at the time the draft was presented, yet it could not escape accepting the draft if the documents accompanying had been in proper shape. (See *Beneke v. Haebler*, (1899), 58 N. Y. S. 16, affirmed by Court of Appeals, 60 N. E. 1107.)

In *American Steel Co. v. Irving Natl. Bank*, 266 Fed. 41, the court says:

"There is but one vital question involved in this case: It is whether the letter of credit already set forth herein is a complete and independent contract between the plaintiff and the defendant. This court is satisfied that it is."

The court also says:

"The law is that a bank issuing a letter of credit, like the one here involved, cannot justify its refusal to honor its obligation by reason of the contract-relations existing between he bank and its depositor."

document called for goods which the buyer was bound to accept. The banker knows only the letter of credit, which is his only authority to act, and the documents which are presented under it. If these documents conform to the terms of the letter of credit, he is bound to pay. If not, he is equally bound not to pay."

These authorities show that the bank was not interested in the performance of the contract between the buyer and seller, and was not obliged to look after the interests of the buyer, but, on the other hand, the International, as buyer of the sugar, was directly interested in seeing to it that the contract with the seller had been fully executed on the seller's part. Part of this contract was that the documents accompanying the draft and bill of lading should specify the sugar to be "Standard White Granulated Sugar." The documents did not so specify, and therefore the International would have been justified in rejecting the whole shipment and holding Kelley & Co. for damages, but in spite of the want of proper documents, it was able to take the greater part of the shipment, and, the contract being severable, it took so much of it as was necessary to fill the Montgomery Ward & Co. contract and rejected the balance. By this action it minimized its claim for damages as much as possi-

ble, and relieved the bank from the greater part of the consequences of its blunders.

II

As to the other branch of the case in which we contended that the Montgomery Ward & Co. transaction and the Sexton & Co. transaction were separate and distinct; that separate and distinct letters of credit should have been issued; that there should have been separate and distinct drafts, and that defendant in error should have accepted and paid the one, and should have refused to accept or pay the other, the court says:

"Whatever else may be said of the relationship between the parties, Waterhouse & Co. was necessarily invested with implied authority to do whatever was necessary and proper to obtain letters of credit in the usual and customary way."

We do not dispute this proposition, for that would follow whether Waterhouse & Co. were considered as an independent contractor as well as if it were considered as an agent. But we deny that Waterhouse & Co. had any authority to do anything or to consent to anything, to authorize or ratify anything that was *unnecessary, improper*, and not *usual* or *customary*. We claim that the bank in combining

the two transactions did something that was *not necessary*, was *not proper*, and was *not usual* or *customary*.

(a) It was *not necessary* to combine the two transactions. The first cablegram answered the purpose as far as procuring the sugar destined for Montgomery Ward & Co. was concerned, and a second cable of a similar import would have answered as far as the sugar destined for Sexton & Co. was concerned.

(b) It was *not proper* to combine the two transactions into one, because, as we have seen, the conditions in the Montgomery Ward & Co. letter of credit were different from those in the Sexton & Co. letter of credit, and the bank should have foreseen that the combination of the two transactions might lead to the embarrassing complications which actually did result. If the two transactions had been kept separate by the bank, it could have, with safety, accepted a draft drawn upon it for the sugar to fill the Montgomery Ward & Co. contract, and it could have properly refused a draft drawn for the Sexton sugar. By combining the two transactions into one, it placed itself in a position where it had either to accept both or refuse both. It was therefore highly improper for the bank to combine the

two into one, in fact, it was its initial blunder, and the cause of all its subsequent troubles.

(c) That it was *not usual or customary* to so combine dissimilar transactions is self-evident. It is not *usual* or *customary* for banks to perpetrate such blunders. If it were, they would soon get out of the habit. Besides, there was no evidence whatever to the effect that it is, usual and customary to so combine dissimilar transactions.

There is no evidence whatever that Waterhouse & Co. was aware that the bank had combined the two transactions into one by its cablegrams. It did, indeed, sign a writing purporting to be a letter of credit and guaranty in which both transactions were combined, but such letter was never sent, and this document served only to fix the responsibility of Waterhouse & Co. to the bank. This writing was signed after the cablegrams had been sent, so it could not be evidence of authorization, and it could not be evidence of ratification unless it was shown by the evidence that Waterhouse & Co. had knowledge of the combination, and such evidence is wholly lacking.

But even if Waterhouse & Co. might be held to have either authorized or ratified the combination, it could not bind the International by such action,

for, in the first place, it was not the agent of the International, and hence could not bind it. (See our opening brief, pp. 33 to 36.) In the second place, even if Waterhouse & Co. should be considered the agent of the International, there would be no implied authority to authorize or ratify an act which was manifestly *unnecessary, improper, and not usual or customary.*

The court further says:

"Nor did it (Waterhouse & Co.) exceed its authority in executing the guaranty. The defendant in error had refused to issue the letters of credit for the Trading Company with the bills of lading as sole security, and the parties necessarily understood that there must be further security on the part of Waterhouse & Co. The guaranty and lien were suitable security to the end in view, and were, therefore, within the contemplation of the parties."

We do not dispute this proposition if it is limited to holding that it was proper for Waterhouse & Co. to sign this guaranty. On the contrary, so limited, we admit that it was eminently proper. It was necessary for the bank to have written evidence of Waterhouse & Co.'s responsibility, and there is no doubt but what Waterhouse & Co. could sign anything it pleased, and could pledge its own interest in the transaction to any extent it desired, but we

deny that it had authority to bind the International Trading Company by this guaranty, because, considered as an independent contractor, it had no authority to bind the International whatever, and, considered as an agent, it had no authority to bind it unnecessarily. (See our opening brief, pp. 33 to 38.)

In conclusion, we submit that the bank was negligent, first, in combining the two transactions into one; second, in accepting the draft, and, third, in failing to give notice of the situation. Further, that the International Trading Company never authorized, ratified or condoned such acts of negligence, directly or indirectly.

It follows that the bank, and the bank alone, should stand the loss occasioned by such negligence, and should not be allowed to shoulder any of it on to the International.

We therefore respectfully submit that a re-hearing should be granted.

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Attorneys for Plaintiff in Error.

We, the undersigned, of counsel for the plaintiff in error herein, do hereby certify that in our opinion, and in the opinion of each of us, the foregoing petition for re-hearing is well founded and that the same is made in good faith and not merely for the purpose of delay.

EDGAR S. HADLEY.
ROBERT P. OLDHAM,